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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1992

KEVIN CONARD and VINCENT FUDZIE,
Petitioner,

vs.

UNIVERSITY OF WASHINGTON and DON JAMES and JANE DOE JAMES, husband and wife, and the marital community composed thereof,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTIONS PRESENTED

1. WHETHER TERMS OF THE ATHLETIC SCHOLARSHIP GRANT BETWEEN THE UNIVERSITY AND CONARD AND FUDZIE CREATED A CLAIM OF ENTITLEMENT/PROTECTED PROPERTY INTEREST IN THE RENEWAL OF SAID SCHOLARSHIP.

2. WHETHER THE UNDERSTANDINGS AS TO THE TERMS OF THEIR SCHOLARSHIP GRANT BETWEEN THE UNIVERSITY AND CONARD AND FUDZIE WERE MUTUALLY EXPLICIT UNDERSTANDINGS, CREATING A CLAIM OF ENTITLEMENT/PROTECTED PROPERTY INTEREST IN THE RENEWAL OF THEIR SCHOLARSHIP GRANT, OR MERELY UNILATERAL EXPECTATIONS ON THE PART OF CONARD AND FUDZIE.

3. WHETHER THE EXISTANCE OF A LEGITIMATE CLAIM OF ENTITLEMENT/PROTECTED PROPERTY INTEREST CREATES FOR ITS RECEIPENT DUE PROCESS PROTECTIONS.

4. WHETHER THE HEARING AFFORDED TO THE PETITONERS PROVIDED ANY DUE PROCESS, PRIOR TO THE REVOCATION OF THEIR SCHOLARSHIPS.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Kevin Conard and Vincent Fudzie and the respondents University of Washington et al. The respondents before this Court include the University of Washington.

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The petitioners Kevin Conard and Vincent Fudzie respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington, entered in the above entitled proceedings on September 28, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Washington, Division I is reported at 62 Wn. App. 664, and is reprinted in the appendix hereto, p. a-1, infra.

The opinion of the Supreme Court of the State of Washington is reported at 119 Wn.2d 519. It is reprinted in the appendix hereto, p. a-22, infra.

JURISDICTION

Invoking federal jurisdiction under the Fifth and Fourteenth Amendments of the Constitution of the United States of America. On September the 3rd 1991 the Court of Appeals of the State of Washington, Division I reversed the decision of the Superior Court of King County, Washington and held that the athletic scholarships issued by the University of Washington herein created a legitimate claim of entitlement to which due process protections apply.

On review the Supreme Court of the State of Washington, reversed the decision of the Court of Appeals, holding that the scholarships issued did not create a legitimate claim of entitlement to which due process protections applied. Order denying reconsideration was entered in this matter on September 28, 1992. See p. a-47, infra.

The jurisdiction of this Court to review the judgment of the Supreme Court of the State of Washington is invoked under 28 U.S.C. 1257 (3).

STATEMENT OF THE CASE

1. Statement of the Procedural History. The plaintiffs/appellants Kevin Conard and Vincent Fudzie initiated this action by filing a Summons and Complaint on December 12, 1988. The University of Washington and Don James and his marital community are the

defendants/respondents. Respondents noted a motion for summary judgment for February 21, 1990. The order granting respondents' motion for summary judgment dismissing appellants' claims was entered on February 22, 1990. Appellants filed notice of appeal to Division I of the court of Appeals on March 14, 1990. Appellants' Civil Appeal Statement was filed on March 30, 1990. On May 29, 1990 Appellants' brief was filed. On February 20, 1991 the court heard oral argument. On September 3, 1991 the court filed its decision in this matter, the ruling of this court reversed the superior court as to Mr. Fudzie, and remanded back to the superior court to order an appropriate hearing be held by the University. Further, the court affirmed the superior court ruling dismissing Mr. Conard's claims.

On August 6, 1992 the Washington State Supreme Court entered an order reversing the decision of Court of Appeals and holding that petitioners had no legitimate claim of entitlement/protected property interest in their scholarship grants. Petitioners moved for reconsideration of this decision on August 26, 1992, which motion was denied on September 28, 1992, terminating review of said case.

2. Statement of the Facts. This case involves damages incurred by the plaintiffs due to the University's denial of legitimate claim of entitlement and the attendant constitutional due process entitlements owing to the petitioners. The petitioners, Kevin Conard and Vincent Fudzie, were members of the University of Washington

varsity football team and students in good standing at the time of the complained of acts.

In 1983, the petitioners were recruited by Don James and the University of Washington to play football and matriculate at the University. Said recruitment included oral representations and visits to the homes of Messrs. Conard and Fudzie by University of Washington coaches (agents and representatives).

On February 9, 1983, Messrs. Conard and Fudzie signed and accepted offers of Athletic Financial Assistance. Said offers and awards were for one academic year with renewal automatically as long as the student athlete "remains in good standing scholastically, maintains normal progress toward graduation, and is in compliance with eligibility requirements of the University of Washington, Pac-10 and NCAA."

On this same date Conard and Fudzie signed National Letters of Intent. This contractual agreement effectively precludes the signee from attending any other NCAA-member institution and competing in the sport indicated therein for two years if they subsequently decide that they no longer wish to attend that particular institution, with which they initially signed.

Messrs. Conard and Fudzie were members of the University of Washington varsity football team for 3 years. For each of these years their aid was renewed, pursuant to the terms of their Aid grants with the University, as they remained during this period, students in "good standing."

In December of 1985, the University of Washington was participating in the Freedom Bowl in Anaheim, California. On the night of December 22, 1985 Messrs. Conard and Fudzie went to the Red Onion, a restaurant/nightclub in Santa Ana, California. Their presence at this restaurant violated no team or school rules. Messrs. Conard and Fudzie were arrested after being harassed and asked to leave this restaurant, by Red Onion employees, which included off-duty Santa Ana police officers retained as security guards. All charges in this matter were subsequently dropped against both Conard and Fudzie.

Furthermore, Conard and Fudzie recovered damages from the Red Onion as part of a class action law suit in which it was shown that the Red Onion had a racial exclusion policy in which employees were instructed to employ various discriminatory practices to exclude Blacks, Hispanics, Arabs and other ethnic minorities from gaining entrance into their restaurant/nightclubs. These discriminatory practices were the sole reason for Messrs. Conard and Fudzie's harassment and arrest on December 22, 1985.

Upon learning of their arrest, Coach James arbitrarily and capriciously removed Messrs. Conard and Fudzie from the football team and informed them that their aid for the upcoming year would not be renewed. Further, James informed Conard and Fudzie that they had to arrange their own transportation back to school in Seattle.

This action was taken without any hearing being provided to Messrs. Conard and Fudzie. The opportunity for

a hearing was not provided to Messrs. Conard and Fudzie until July of 1986, some seven months following their notice from Don James that their aid would not be renewed. By this time Conard had already made the decision to transfer to another school. When a hearing was finally held for Fudzie it was devoid of any due process protection, as is reflected in the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

This is a case of significant public concern and consequence as it involves the relationship of our Universities with the student athletes of this and every other state in the country who are aggressively recruited by these Universities to participate in their intercollegiate athletic programs and to matriculate at said Universities. The essence of the petitioners claim is that their athletic financial aid was improperly terminated by James and the University, and that they had a constitutionally protected property interest in the renewal of said aid.

I.

The Washington State Supreme Court's position that no legitimate claim of entitlement is created by the athletic scholarship grant between the University and the student athlete, (a) raises important issues and (b) is clearly wrong.

This matter involves the contractual relationship between student athletes and the Universities of this country. This issue encompasses thousands of young men and woman throughout this country, who every year are recruited and

wooed by these Universities. This recruitment process culminates with these young student athletes entering into legally binding contractual agreements with the University, without being advised of their right to seek legal counsel so that they may be fully advised of the legal implications of the agreements into which they are entering.

Intercollegiate athletics in this country, at their highest level, have become major big business, producing substantial revenues for the University. Unfortunately, the student athlete who makes all of this possible by his or her performance on the athletic field does not reap the full benefit of this success. In fact, under the decision of the Washington Supreme Court in the instant case, the student athlete who enters into this one-sided contractual relationship with the University is there merely at the whim of the University; their aid can be terminated unilaterally, without cause, at the end of each year. Hence, under the decision of the Washington Supreme Court, if a student athlete did not perform satisfactorily on the athletic field his aid could be terminated.

The petitioners posit that this is not the relationship which they envisioned, nor is it the relationship this society would envision should exist between the student athletes and the Universities of this country. The petitioners further posit that the question, as to whether their athletic scholarships create legitimate claims of entitlement and corresponding due process protections, is of great importance to every student athlete and University in this country.

It has been established in the record (1) that a contract existed between the parties; (2) that both parties understood and were intent upon executing said contract; (3) that the representations and practices of the University mandated athletic financial aid for a period of a minimum of 4 to 5 years; (4) that renewal of said scholarship, absent noncompliance with the terms of the scholarship grant was understood and contemplated by the parties; (5) that the University provided some procedure for contesting the deprivation of said protected property interest.(i.e. the hearing process upon nonrenewal which was afforded Fudzie); and (6) that actions on the part of the University illustrate the existence of a legitimate claim of entitlement.

This is reflected in the record by the deposition statements of Eric Godfrey and Don James as well as the affidavits of Conard and Fudzie. This testimony as to the understandings, customs and practices is unrebutted. No where in affidavit or deposition testimony provided by the University is the fact, that the duration of the contract is for at least 4 to 5 years, disputed by the University. Nevertheless, counsel for the University makes this argument with no factual supporting evidence of any kind.

Conard and Fudzie state their understanding as created by the aid agreement which they signed, their interactions with University recruiters, as well as the conduct of the parties, in subsequent renewals. It is clear that the understanding, of both parties, was that the duration of their contract was for 4 to 5 years, as long as they complied with

certain requirements. Further, it is clear from the testimony that this was the exact same understanding and intent held by the University, as exhibited by the deposition statements of Godfrey and Coach James.

Further, the understanding between the parties as to the terms of the contract regarding renewal were that as long as there was compliance with the terms as set forth the aid would be renewed. This understanding was further, supported by the actions of the University in renewing the aid of Conard and Fudzie on at least two prior occasions.

Further, it is evident from the record that the University's decision to follow James' recommendation of nonrenewal was made absent a finding of any type of wrongful conduct on the part of Conard and Fudzie, whatsoever, but was instead made on unsubstantiated allegations of misconduct, alleged to have occurred years prior to the decision by James and the University not to renew the athletic financial aid of Conard and Fudzie.

As to Mr. Fudzie the court of appeals held at page 8, paragraph 1, of its opinion that "The University's practice is to renew athletic scholarships for at least 4 years. Further, it was the policy of the University to accord athletic scholarship students due process before nonrenewal." And, that, "Even if it were not University policy, Fudzie's scholarship, issued under a representation that it would be renewed subject to certain conditions, provided him with a legitimate claim of entitlement that warrants the protection of due process before any deprivation of that claim of entitlement."

As to Mr. Conard the court of appeals held that his allegedly insufficient academic performance had made him ineligible for renewal in any event and that further he did not avail himself of the hearing process, hence the decision of the superior court dismissing his claims is affirmed. The court makes this statement despite the fact that there is no evidence in the record that his academic performance was deficient at the time of Don James recommendation of nonrenewal, nor is there any evidence in the record that deficient academic performance was the reason put forth by James and considered by the University in making its' decision to not renew his athletic financial aid. In fact, the opposite is true, as the record indicates that the sole reason put forth for the recommendation to not renew, were the allegations of misconduct put forth by Coach James. There is no reference whatsoever in the record that the Committee considered his academic performance in making its determination to not renew Conard's athletic financial aid. Further it is clear from the record that Mr. Conard was not notified in the University's letter of July 1, 1986, that his aid was not being renewed due to academic deficiency. The allegation that he could have been released in any event, due to his academic deficiency, was not put forth until the University's motion for summary judgment, brought in the superior court, nearly four years following the initial incident. There is no due process when action is taken against an individual, which action is based upon allegations of which the party has no notice and upon facts which are not in existence!

In order for a legitimate claim of entitlement to the renewal of scholarship to exist it must be created by one of the following: 1. the terms of the contract; 2. a mutually explicit understanding, or by 3. substantive procedural restrictions on the part of the decision maker. It is only necessary that one of these criteria be met in order to invoke the constitutional due process protections.

In conjunction with executing the National Letter of Intent, the plaintiffs executed Offers of Financial Aid. Paragraph 5 of the document states:

> This assistance will be considered for renewal during subsequent periods of attendance, as long as you may be a student in good standing, maintain normal progress towards graduation, and are in compliance with eligibility requirements of this institution, the Pacific-10, and the NCAA.

Further, the policies and procedures manual of the Department of Intercollegiate Athletics which makes recommendations regarding the renewal and nonrenewal of athletic scholarships provides:

> If a coach wishes to withdraw recommendation for financial aid at anytime, justification within the rules of the Conference and the Associations (AIAW/NCAA) must be fully established. Each student-athlete is entitled to due process and if the student-athlete requests an appeal as well as a hearing, one will be provided.

Further, the opportunity for a hearing is also set forth in section 3-4(g) of the NCAA constitution.

> In the latter event [a decision of nonrenewal], the institution also shall inform the student-athlete that if he or she believes the grant has not been renewed for questionable reasons, the student-athlete may request, and shall have the opportunity for, a hearing before the institutional agency making the financial award. The institution shall have established reasonable procedures for the prompt hearing of such a request.

These contracts are one year renewable contracts, as is clearly shown by the language of the contracts and surrounding documents, as well as the conduct of the parties, and the customs and practices of college athletics at the University, for periods of at least five years or the duration of the student-athletes athletic eligibility.

The Washington State Supreme Court holds that the terms, in regards to renewal, are not sufficiently definite to establish a legitimate claim of entitlement to the renewal of plaintiffs' athletic scholarships. The Court apparently interpreted the word considered, as granting the University a unilateral right to determine whether the aid will be renewed, with or without cause. This interpretation is not consistent with the customs, conduct, practices or policies of the contractual relationship between the University and the student-athletes under contract.

Determination of intent of contracting parties is to be accomplished by viewing the contract as a whole, the subject

matter objective of contract, subsequent acts and conduct of the parties to the contract , and reasonableness of the respective interpretations advocated by the parties. Stender v. Twin City Foods, Inc., 34 Wn. App. 825, 644 P.2d 527 (1983).

Further, evidence of the fact that a protected property interest existed in the plaintiff's right to renewal of the scholarship grants is provided by the Department of Intercollegiate Athletics policy requiring the student-athlete be afforded a due process hearing upon a determination of nonrenewal of his scholarship grant. Obviously, the student-athlete has a legitimate claim of entitlement in his scholarship. If he did not, the University would not provide him with a due process opportunity to protect that interest. If it were intended that the University could terminate aid at will, there would be no need for terms which reference the conduct of the student-athlete, and there would be no need or right to a hearing.

The Court must view the terms of the contract within the context of the environment in which it exists. It is clear to see that the terms of this contract mandated a contract that would be renewed as long as the student-athlete complied with the terms therein.

The Court of Appeals, at P. 8-9 of its opinion, states that Mr. Fudzie has a legitimate claim of entitlement in the nature of a property right worth thousands of dollars over the undergraduate period, and that this entitlement warrants the protection of due process before any deprivation of that claim

of entitlement. The factual evidence herein clearly supports that finding. In fact, there is no evidence which could support a contradictory finding.

II.

The Washington State Supreme Court's position that no legitimate claim of entitlement is created by the athletic scholarship grant between the University and the student athlete, is in clear conflict with decisions of this Court.

In Perry v. Sindermann, 408 U.S. 593, 601,602 (1972), the court stated:

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teachers claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." 3A. Corbin on Contracts Sec. 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." Id., at 562. And, "the meaning of [the promisor's] words and acts is found by relating them to the usage of the past.

In this case it is clear from considering all of the relevant facts that Conard and Fudzie's interest in their

scholarship and it's renewal constitutes a protected property interest.

The Washington State Supreme Court has made a determination here which is undeniably in error. The court has stated that there is no evidence to support the proposition that a mutually explicit understanding existed between Conard and Fudzie and the University, hence entitling Conard and Fudzie's scholarship grant to be recognized as a protected property interest.

The record in this case clearly evidences the fact that the appellants possessed a property right in their athletic financial aid and the renewal thereof. It is axiomatic that where the appellants had a property right, a contractual right existed as well. If we consider Perry v. Sindermann, 408 U.S. 593 (1972), this will become evident to the court, as portions of the facts are strikingly similar to the present case. In Sindermann a professor employed for 10 years in the state college system under a series of one year written contracts was released when the school declined to renew his employment contract for the following year without providing him an explanation or prior hearing. Sindermann alleged that he had an interest in continued employment, and though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration.

The court herein ignores the similarities in this case with Sindermann and attempts to analogize the facts with those of Santella v. Chicago, 936 F.2d 328 (7th Cir. 1991);

Kraft v. Jacka, 872 F.2d 862 (9th Cir. 1989). Two cases which are clearly distinguishable from the present case on the facts and law. The court herein completely ignores the critical factors which must be considered and under which this case must be analyzed. In determining whether or not a mutually explicit understanding existed between the parties as to the duration and renewal of said agreement.

In the case at bar not only were there representations, it is clear that these representations created a mutually explicit understanding that the term of the contract was in fact for a term of 4 to 5 years, or the expiration of the student-athletes' athletic eligibility, at the minimum, and that the contract would be renewed annually absent misconduct. This understanding is not refuted in any testimony put forth by the University. Further, the written terms of the contract explicitly imply that renewal will occur if the student athlete complies with certain conditions as set out in the written contract.

Further, the University had written policies mandating due process hearings for student-athletes whose aid had not been renewed. In the case at bar the University failed to establish any breach in these conditions on the part of the plaintiffs.

Further, as to the intent and understandings of the parties, it is a well stated rule of contract law that agreement though not formalized in writing may be "implied." 3 A. Corbin on Contracts Sec. 561-572A (1960). Explicit contractual provisions may be supplemented by other

agreements implied from "the promisor's words and conduct in the light of the surrounding circumstances." And, "the meaning of the promisor's words and acts is found by relating them to the usage of the past."

In this case the factual evidence in regards to the existence of a mutually explicit understanding are as follows:

1. Affidavits of Conard and Fudzie in which they state specifically their understanding as to the duration of the contract and as to its renewability, which understanding was garnered from the representations and documents provided by the University's recruitment staff, as well as the conduct and actions of the parties during the contract and subsequent renewals.

2. Deposition testimony of Don James P.44, L.14:

Q: So, once they get that scholarship if they just keep their noses clean and workout and meet practice and those kind of things...

A: Stay eligible.

Q: ... they'll get money for the scholarship every year?

A: Sure.

Also, see page 27 of James' deposition, which further supports the existence of the mutually explicit understanding as stated by Conard and Fudzie, evidenced by James repeated assertions that the student athlete must take some action which is not in compliance with the terms of his scholarship grant in order for there to be a non-renewal.

3. Deposition testimony of Godfrey.

In none of the testimony above referenced, which is the only factual testimony we have in this matter, is this understanding rebutted by the University. In fact, it is confirmed by the statements of Godfrey and James.

Yet the Washington State Supreme Court apparently chooses to ignore the factual evidence and justifies its position by stating that "Conard and Fudzie in their affidavits did not indicate which representative of the University made the statements to them." Apparently the courts reasoning is that absent a name of the individual making the statement, they could not have formed an understanding. This rational is not plausible. Hence, it is impossible from the evidence presented herein for this court to find that a mutually explicit understanding as to the duration and renewal of the scholarship grant did not exist.

In determining whether or not a mutually explicit understanding exists as to the terms of the scholarship grant, it is imperative that the court embrace traditional contract principles, with due attention given to the intent of the parties, the nature of the transaction, the environment within which it was negotiated, and pertinent considerations of public policy.

Further, it is clear from the deposition testimony of both Godfrey and James that the University's consistent policy and practice was to renew the aid of these student athletes from year to year, absent the student athlete being in noncompliance with the terms of the scholarship grant.

In this case, as in Sindermann, the Petitioners have alleged the existence of rules and understandings, and conduct

promulgated and fostered by the University that support their claim of entitlement to continued financial aid absent "some showing that they were not in compliance with the terms of the contract entered into between themselves and the University." In this case the record indicates that there is no dispute that the contract was for a period of 3 academic quarters, and it was a renewable contract that would be renewed for 4 to 5 years as long as the student athlete complied with certain conditions.

See Deposition Statement of Eric Godfrey in which he stated that "... I can just tell you that the commitment on the part of the University, in compliance with NCAA Regulations, is if the student meets these conditions, the aid will be renewed for the next academic year."

In the present case the University promised to consider for renewal given compliance with the rules of the University, NCAA and Pac-10. If consideration for renewal will be given as long as the Petitioner is in compliance with the above referenced rules it is axiomatic that for the financial aid not to be renewed would require some finding that the appellants conduct was not in compliance with the rules of the University, NCAA or Pac-10. In the present case, a valid finding of misconduct was never made against either Conard or Fudzie.

At page 18 of the decision of the Washington State Supreme Court it is stated that plaintiffs argument, that they did not know of any student whose aid was not renewed who was in compliance with those conditions, was insufficient to

create a common law of renewal and that, like in Roth, plaintiffs pointed to no written rule or policy which supports their entitlement. The Court then pointed to the language "this assistance will be considered for renewal during subsequent periods of attendance...", as not supportive of plaintiffs right to renewal.

This clause creates predicate behavior which must be met and takes the decision from being one which is unilateral in nature to one which will follow if certain criteria are met. This interpretation is consistent with testimony of all parties involved as to their understanding of the terms of the contract. Apparently what the Washington State Supreme Court is endeavoring to do herein is supplement its own understanding for that of the parties.

Further, it is clear from the testimony of all parties involved that their understanding of the term considered for renewal was that as long as the student athletes were in compliance with the predicate behavior their aid would be renewed. This understanding is not denied or rebutted by any factual testimony presented in this matter.

Due process envisions a hearing opportunity to protect an individuals' property and/or liberty interests. If it has been determined that there is no property or liberty interest to be protected, there is no right to a hearing. In, Board of Regents v. Roth, 408 U.S. 564 (1972), the court found that no property right existed and hence, no constitutional right to a hearing existed. The key fact in this case, according to the court, was that the contract between

Roth and the University specifically provided that his employment was to terminate on a specific date. The contract did not provide for contract renewal absent "sufficient cause." Further, there were no written provisions in Roth, indicating that employment was for a period more than one year, in fact the terms were clear that the employment was for one year and terminated at the conclusion of that period without cause. And, provided no hearing procedure or right. Also, there was no conduct between the parties or otherwise regarding previous renewal, that would have supported the existence of a mutually explicit understanding as to the duration of the employment and the right to renewal. Hence this case is clearly distinguishable from the present case.

In fact, in Roth, no provision for renewal was made whatsoever. This is compared to the facts of the case at bar and to the holding in Sindermann, where it was found that a property right did in fact exist, in that the contract between the University and Sindermann could be interpreted to provide for renewal, if certain conditions were met. The property right at stake is the right of renewal, under the contract. That such an understanding as to the terms of this contract existed is undeniable (or at least it has not been denied in any factual testimony in this record). The purpose of the due process hearing is to ensure that renewal or nonrenewal is in compliance with those conditions, set forth in the scholarship grant. Hence, it is absolutely necessary that any allegations of wrongful conduct put forth as reasons for nonrenewal of the aid be thoroughly adjudicated.

Further, it is abundantly clear that without the underlying contract right to renewal, no property right to renewal exists. And, it is clear that the contract right to renewal existed in the present case.

At page 21 of its decision the Washington Supreme Court states that there are no sufficiently specific understandings to create a mutually explicit understanding as to what acts constitute serious misconduct. Hence, the court concludes that since there are not sufficiently specific terms to create a mutually explicit understanding as to what acts would constitute serious misconduct, the University can basically do as it pleases and make up the rules as it goes along, in determining what constitutes serious misconduct. This is exactly what the University did which totally contradicts the concept of due process.

Although the Washington State Supreme Court did not address this issue, as it found that no protected interest existed hence no hearing was required, the decision of the Court of Appeals, setting procedural due process guidelines for the University, is instructive.

Although, the court's setting of procedural due process guidelines for the University to follow in future hearings is a much needed mandate, remand of this matter to the University to hold an appropriate hearing is not the proper remedy as to Mr. Fudzie. He has been aggrieved by the University's actions, which the Court of Appeals has found to be woefully inadequate. Hence, justice and equity require that he be compensated, for the damages which he has incurred

due to the improper actions of the University. To provide the University with a second bite at the apple, so to speak, would be a gross injustice.

Hence the court should make a determination as to damages or remand to the superior court for a determination on the issue of damages.

The Washington State Supreme Court affirmed the decision of the superior court's dismissal of all claims of Kevin Conard, due to the following: 1. That Mr. Conard was academically ineligible in any event at the time of his nonrenewal and; 2. That Mr. Conard failed to seek a hearing once he was notified of the determination of nonrenewal.

The critical question here is whether Conard's claims should be dismissed due to his failure to pursue a spurious hearing, which would have been held some 9 months after he was told by Coach James that his aid would not be renewed for the upcoming academic year. A significant flaw in the due process provided Conard concerns the timing of the notice and opportunity for hearing.

This Court has found that interpretation and application of the Due Process Clause are intensely practical matters and that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria Workers v. McElroy, 367 U.S. 886,895 (1961). It also appears from the cases that timing and content of the notice and the nature of the hearing are very important, in assuring adequate due process. Cafeteria Workers, supra.

In the present case the interest in a timely hearing is essential to a meaningful hearing. Although, Conard was informed by James of his intent to recommend nonrenewal in December of 1985, he was not formally informed of this (by the University's letter) until sometime in July of 1986. Mr. Conard, assuming that he had no right of recourse in this matter immediately began focusing his attentions on transferring to another University. He was not aware that he had the possibility of retaining his athletic financial aid. Due process would seem to require a timely hearing, from the time that Coach James informs a player that his aid will be recommended for nonrenewal, as it is at that point that the student athlete becomes impacted by this decision in his ability to plan his future course of education. It is evident that the untimely opportunity for hearing, in this matter had a severe chilling effect upon Conard's decision to seek a hearing and in equity he should not be punished by the University's flawed system.

CONCLUSION

Based upon the foregoing reasons, this petition for certiorari should be granted.

Dated this 26 day of December, 1992.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEVIN CONARD and VINCENT FUDZIE, Appellants, v. THE UNIVERSITY OF WASHINGTON, DON JAMES and JANE DOE JAMES, husband and wife, and the marital community composed thereof, Respondents.	) NO. 25813--I) DIVISION ONE) FILED: SEP 03 1991

BAKER, J. - Two University of Washington students appeal the summary judgment dismissing their complaint, brought against the University for breach of contract and against Don James for contractual interference after the nonrenewal of their athletic scholarships. We reverse in part and affirm in part.

Vincent Fudzie and Kevin Conard were recruited for the University of Washington (UW) football team and offered athletic financial assistance in 1983. The offer stated:

> If you enroll, you will receive assistance for three consecutive quarters[.]
>
> . . .
>
> This assistance will be considered for renewal during subsequent periods of attendance as long as

> you are a student in good standing, maintain normal progress toward graduation and are in compliance with all eligibility requirements of this institution, the Pacific-10, and the NCAA.

(Emphasis in original.)[1]

A sheet attached to the offer explained that

> 4. After completion of the above stated period of this award, upon the recommendation of the Head Coach, the Director of Athletics, and the Faculty Representative, the Committee on Financial Aid will consider granting renewal of the assistance, providing you (1) meet the academic requirements of the National Collegiate Athletic Association [NCAA], the Pacific-10/Nor Pac Conference and the University, and (2) are a student in good standing in every respect as determined by the rules, regulations and administrative decisions of the University, the Pacific-10/Nor Pac Conference and the National Collegiate Athletic Association.

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[1]Attached to the offer was a sheet which stated:

"2· Financial aid shall not be revoked or altered during any period for which it has been granted except that the University may revoke aid in whole or in part if the student:

". . .

"c. engages in serious misconduct warranting substantial disciplinary penalty[.]"

This language parallels the language of the NCAA constitution 3-4-(c)(2):

"Aid may be gradated or canceled if the recipient . . . (iii) engages in serious misconduct warranting substantial disciplinary penalty[.]"

Affidavits filed by Conard and Fudzie reflect their belief that the scholarship aid offered was for at least 4 years. Conard and Fudzie stated:

> That the relationship between a student/athlete and the university/football program is expected to last for at least four years is commonly understood throughout the intercollegiate athletic community. It is only common sense, considering that these institutions do not spend all the time and energy required in recruiting these student/athletes with the expectation that they will only remain in their program for one year.

After enrollment at UW, Fudzie and Conard were reportedly involved in several incidents. Police reports in the record reflect investigations into the following alleged incidents:

1983 Conard was arrested for use of stolen meal cards. Fudzie was with Conard on one of the occasions but was unaware the card did not belong to Conard.

1984 Conard and Fudzie were arrested for extortion and unlawful imprisonment in an incident involving a UW coed.

1984 Fudzie broke a $50 dormitory window in anger.

1984 Fudzie and Conard assaulted a man in the dormitory and took his watch. The watch was returned.

1984 Fudzie forced his way into a student's dormitory room and assaulted him.

None of the incidents resulted in a prosecution. Coach James related in his affidavit that he met with and counseled Fudzie and Conard on three occasions after these incidents and warned them that they could be removed from the team and their scholarships discontinued if such behavior continued. Fudzie and Conard's affidavits do not mention any counseling by James but state they were never sanctioned or disciplined for any reason or placed on any suspension or probation. Both Fudzie's and Conard's scholarships were renewed for the 1984 through 1985 and 1985 through 1986 school years.

James also stated in his affidavit that he met twice with Conard in October 1985 due to his unacceptable behavior toward equipment personnel and his failure to report an injury properly. James stated he told Conard that because of all the problems, James would probably not recommend renewal of his financial aid.

Two months later the team traveled to California to compete in the Freedom Bowl. Fudzie and Conard were arrested after an altercation at a restaurant and did not appear at practice. James stated that he spoke with Conard, Fudzie, and the arresting officer, following which he told the students they could not play in the bowl game. He also told them they were off the team, and that although their scholarships would continue until the end of the school year, he would not recommend renewal of the scholarships. Conard and Fudzie stated in their affidavits that they were

totally exonerated in this incident and all charges were dropped. Further, Conard and Fudzie, who are African-Americans, stated that the incident occurred because the restaurant had a policy of excluding minorities. James stated that he felt the students should have avoided a confrontation by walking away when asked to leave.

The UW Intercollegiate Athletics Policies and Procedures Manual identified by the Director of Financial Aid, Eric Godfrey, at his deposition, sets out the process for nonrenewal of financial aid:

> (b) If a coach wishes to withdraw a recommendation for financial aid at any time, justification within the rules of the Conference and the Associations (AIAW/NCAA) must be fully established. Each student-athlete is entitled to due process and if the student-athlete requests an appeal as well as a hearing, one will be provided.

Both students were sent notification July 1, 1986, that their scholarships would not be renewed. Fudzie requested a hearing, which was held before the UW Athletic Financial Aid Committee in September 1986. Godfrey, who chaired the committee, stated in his deposition that the committee was unaware if there were findings of guilt or innocence as to the meal card, extortion, or California incidents.

No documentation was provided to the

committee.[2] Godfrey stated that the cumulative effect of the numerous instances of violation of standards set by James constituted serious misconduct. The committee upheld the nonrenewal and so notified Fudzie by letter dated October 16, 1986.

Fudzie received nonathletic financial aid the next school year, but either applied late or did not apply the following year and did not receive any aid that year. He graduated with a B.A. in accounting in 1988. Conard was dropped from the UW for inadequate academic performance in the spring of 1986 when his cumulative GPA was 1.99. He transferred to San Diego State University where he expected to graduate in 1990.

Fudzie and Conard brought this suit for damages in 1988, alleging breach of contract by UW and intentional

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[2]The deposition of Eric Godfrey, the committee chairman and Director of Financial Aid, reflects that the packet of information received from James after the hearing contained: a cover memorandum from James; a copy of the team rules; a summary of Fudzie's difficulties; and a sheet describing Fudzie's interactions with the University Book Store staff and supporting receipts.

The record on appeal notes prehearing affirmation and statement of proof at pp. 1 through 138 of the University's clerk's papers. The hearing referred to is not the Athletic Financial Aid Committee hearing, but is an arbitration scheduled before the summary judgment motion was brought. This record is much more substantial than the information provided to the Athletic Financial Aid Committee.

interference with contractual relations by James and the UW. After summary judgment for the defendants, Fudzie and Conard filed this appeal. Because Conard was ineligible for renewal of his scholarship based on his academic performance and because he did not request a hearing after notification of his nonrenewal, we affirm the dismissal of his complaint. We also affirm dismissal of Fudzie's complaint against defendant James, but reverse the dismissal of Fudzie's complaint against the University.

I.

Fudzie contends the trial court erred in finding no issue of material fact as to the duration of the contract. The University argues the contract is clear and unambiguous and evidence of player expectations does not affect the terms of the contract.

This court found in Marquez v. University of Washington, 32 Wn. App. 302, 307, 648 P.2d 94, review denied, 97 Wn.2d 1037 (1982), cert. denied, 460 U.S. 1013 (1983), that an announcement in a law school handbook did not create a right in Marquez to obtain a law degree "absent his meeting and maintaining reasonable standards established by the Law School." Noting that a formal contract is rarely prepared in the student-university relationship, the court looked to a variety of university publications for contract terms. Marquez v. University of Washington, 32 Wn. App. at 305. See Maas v. Corporation of Gonzaga Univ., 27 Wn. App. 397, 618 P.2d 106 (1980), review denied, 95 Wn.2d 1002 (1981).

Unlike Marquez, here there is a formal contract offered by the University and signed by the player and his guardian. However, the written terms of the contract clearly spell out that the scholarship award is for three consecutive quarters, i.e., 1 academic year, and that additional awards will be considered if the player is eligible and meets criteria established by the University, Pac-10, and the NCAA. We find no issue of material fact as to the duration of the contract.

II.

Since the renewal contract by its clear terms only lasted for three academic quarters, and the UW did not withdraw aid during that academic year, there was no breach of contract by the UW. Likewise since there was no revocation of aid during the contract period, it is unnecessary to determine if Fudzie was guilty of serious misconduct supporting such a revocation. However, our analysis does not end here.

The University's practice is to renew athletic scholarships for at least 4 years. Further, it was the policy of the University to accord athletic scholarship students due process before nonrenewal. Even if it were not University policy, Fudzie's scholarship, issued under a representation that it would be renewed subject to certain conditions, provided him with a legitimate claim of entitlement that warrants the protection of due process before any deprivation of that claim of entitlement. See Board of Regents v. Roth, 408 U.S. 564, 577-78, 33 L. Ed. 2d 548, 92 S. Ct.

2701 (1972).

If a person has a legitimate claim to entitlement, he or she is guaranteed the protections of due process. See Goss v. Lopez, 419 U.S. 565, 573, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). In Goss, the United States Supreme Court found that, having extended the right to "education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." Goss, 419 U.S. at 574. Here, the University extended to a student athlete a contract for financial aid for 1 year and the promise to consider renewal given compliance with rules of the University, NCAA and Pac-10. The student thus had a legitimate claim in the nature of a property right worth thousands of dollars over the undergraduate period.

The next question is how much process is due. Morrissey v,. Brewer, 408 U.S. 471, 483, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). We must balance competing interests of an efficient and reasonable administrative process with the student athlete's right to a meaningful hearing. See Goss, 419 U.S. at 579. Clearly, at least notice and an opportunity to be heard are required. In addition, the student athlete who faces nonrenewal of his or her scholarship based on misconduct must be given a written copy of any information on which the nonrenewal recommendation is based in time to prepare to address that information at the hearing. The student should be given the opportunity to present and rebut evidence, and the hearing must be conducted by an objective

decision maker.[3] The student has a right to be represented by counsel and to have a record made of the hearing for review purposes. Finally, the student has the right to a written decision from the hearing board setting forth its determination of contested facts and the basis for its decision. See Morrissey v Brewer, 408 U.S. at 489. We believe these requirements, while somewhat more stringent than those imposed in Goss, are in keeping with the reasoning of the court at 419 U.S. 565. The additional safeguards are justified because the nature of the deprivation in this case exceeds the seriousness of the 10-day school suspension at issue in Goss, and because a hearing such as the one at issue here is relatively rare so no significant administrative difficulty should result. When the necessity for a hearing such as this does arise, the hearing must be conducted with the minimum due process safeguards outlined above. Otherwise, the opportunity for a hearing can be meaningless.

The procedure followed at the hearing requested by Fudzie falls far short of these minimum constitutional safeguards. The hearing here began with a brief statement by the Director of Athletics in support of the nonrenewal recommendation. Coach James was not present, and the Director disclaimed any desire to express James' rules without James being there. He stated he had information from James regarding Fudzie's involvement in the meal card

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[3]In this regard, inclusion on the hearing committee of a person who investigated the alleged misconduct in California at the request of Coach James was inappropriate.

incident and in an incident resulting in jail time (apparently the incident involving a coed). Regarding the latter incident, the Director stated that he did not know if Fudzie had been vindicated or not.

Fudzie then addressed the committee. He denied any involvement in the meal card incident and told the committee he had been totally vindicated in the second incident mentioned by the director. Further, Fudzie informed the committee that the incident in California was racially motivated, that the club was known to have a racist policy, and that he had a civil suit pending. Fudzie acknowledged that prior to the California incident he had been warned by James to stay out of trouble or risk termination.

As Fudzie explained his version of the California incident, one unnamed committee member interrupted to dispute his statements. The committee member said he had the police report and he, at James' request, had talked to the California police the day after the incident to investigate the incident. Nothing in the transcript reveals whether other committee members or Fudzie reviewed the police report.

In discussing this hearing at a deposition, the committee chairman stated he was unaware if Fudzie had been found guilty in the meal card incident or in the extortion incident, and was unaware that Fudzie and Conard were exonerated in the California incident. He stated that the committee reviewed the numerous instances of Fudzie's violation of James' standards and decided that such behavior cumulatively constituted serious misconduct.

After the hearing, the committee asked for and received a packet of written materials from James, outlining team rules and Fudzie's difficulties. These materials were sent to Fudzie along with the letter communicating the decision of the committee to reject his appeal. This was too little, too late. Neither the committee nor Fudzie was informed of the critical facts regarding the alleged incidents of misconduct at the time of the hearing. No one knew whether or not Fudzie had been vindicated in the incidents, as he claimed. Apparently the California incident was the turning point for James, after which he told Fudzie his scholarship would not be renewed. Yet, at the time of the hearing, the committee had no evidence regarding the outcome of the incident. Further, one committee member had investigated the incident for James and acted in a prosecutorial mode at the hearing, cross-examining Fudzie and leaving no question as to his or her lack of impartiality as a member of a supposedly independent appeals board.

Because the actions of the committee at the appeal hearing did not meet minimum due process requirements, we reverse and remand for entry of an order remanding Fudzie's case to the University for an adequate hearing. If the nonrenewal recommendation is retroactively affirmed after a proper hearing, Fudzie's action must fail. If the recommendation is rejected, then

Fudzie will be entitled to the scholarship benefits he lost.[4]

III.

Fudzie contends James acted outside the scope of his authority in recommending nonrenewal and thus was personally liable for interfering with the contract between the player and the University.[5] The University and James contend that James was acting in good faith within the scope of his employment and that under Houser v. city of Redmond, 91 Wn.2d 36, 586 P.2d 482 (1978) he cannot be held liable for contractual interference. Houser, 91 Wn.2d 36, 39, held that: "Recovery for tortious interference with a contractual relation requires that the interferor be an intermeddling third party; a party to a contract cannot be held liable in tort for interference with that contract." (Citations omitted.) Instead, recovery for such interference would be through a breach of contract action. Houser, 91 Wn.2d at 39. Employees of a party are third parties only if they were acting outside the scope of their employment. Houser, 91 Wn.2d at 40. If an officer or employee of a corporation fails to act in good faith, then he is acting beyond his corporate authority, and good faith means "nothing more than an intent to benefit

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[4]Such an award may be subject to any applicable offsets and to potential defenses such as failure to mitigate damages for failing to timely apply for renewal of his non athletic financial aid.

[5]Although the original complaint alleged interference by James and UW, the argument on appeal relates only to James.

the corporation." Olympic Fish products Inc. v. Lloyd, 93 Wn.2d 596, 599, 611 P.2d 737 (1980).

The record does not support the argument that James was acting without authority or outside the proper scope of his employment when he recommended nonrenewal of Fudzie's scholarship. Therefore, the trial court did not err in dismissing the claim of contractual interference against James.

IV.

We briefly comment on two additional issues. It is unnecessary to resolve the parties' argument concerning the applicable statute of limitations. Even assuming the shorter 3-year statute which the UW contends applies, the failure to provide the required due process to Fudzie occurred well within 3 years prior to this litigation.

Secondly, we reject the University's argument that under the Higher Education Administrative Procedure Act (HEAPA)[6] Fudzie's claim is barred for failure to exhaust administrative remedies. Former RCW 28B.19.110(2), relied upon by the University, provides:

> Any person who is ..charged with an offense potentially punishable by suspension, or termination of his relationship with the institution . . . (c) who deems himself aggrieved by the disposition of any contested case following an informal proceeding . . . may have charges against him adjudicated in a formal hearing

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[6]RCW 28B.19 (HEAPA) was in effect *at* the time of the actions at issue here. It was repealed by Laws 1988, ch. 288, § 701, pp. 1394-95, effective July 1, 1989. Laws 1988, ch. 288, § 705, p. 1397.

> pursuant to RCW 8B.19.120: provided, That any request for a formal hearing is directed to the president of the institution or his designee . . . (iii) within ten days after conclusion of the informal proceeding and notice of the final decision to the party charged with an offense.

(Emphasis added.)

However, Fudzie does not fit within the language emphasized above in former RCW 28B.19.110. He was not "charged with an offense potentially punishable by suspension, or termination of his relationship with the institution". Thus, the appeal procedure under that statute is inapplicable.

The decision of the superior court is reversed in part and affirmed in part in accordance with this opinion.

WE CONCUR: _____ _____

KEVIN CONARD, ET AL, Petitioners, v. THE UNIVERSITY OF WASHINGTON, ET AL, Respondents.

[1] Constitutional Law -- Construction -- State and Federal Provisions -- Independent State Interpretation -- Argument -- Necessity. When a constitutional challenge is made under both a federal constitutional provision and its state counterpart, the appellate court will not analyze the issue under the state constitution if the proponent failed to undertake the analysis required by State v. Gunwall, 106 Wn.2d 54.

[2] Constitutional Law -- Due Process -- Property Interest -- Sources -- In General. Property interests protected under the Fourteenth/Amendment include all 'benefits' to which there is a legitimate claim of entitlement. The sources of such a claim are: (1) the terms of a contract; (2) state law amounting to rules or mutually explicit understandings that secure certain benefits and support claims of entitlement to the benefits; or (3) statutes or rules creating

substantive procedural restrictions on the part of a decisionmaker.

[3] Constitutional Law -- Due Process -- Property Interest -- Sources -- Substantive Procedural Requirements. Interests protected under the Fourteenth Amendment may be created by statutes or other rules containing (1) substantive predicates or particularized standards or criteria to guide the discretion of decisionmakers and (2) explicitly mandatory language, i.e., specific directives to the decisionmaker that if the substantive predicates are present, a particular outcome must follow.

[4] Colleges and Universities -- Students -- Financial Aid Nonrenewal -- Due Process -- Contractual Basis Consideration for Renewal. A scholarship for a particular period that provides that it will be considered for renewal during subsequent periods does not establish a property interest protected under the Fourteenth Amendment on the part of the

student in the renewal of the scholarship.

[5] Colleges and Universities -- Students -- Financial Aid Nonrenewal -- Due Process -- Mutually Explicit Understandings -- Factors. In determining whether a student on scholarship has a property interest protected under the Fourteenth Amendment in the renewal of the scholarship based on mutually explicit understandings, a court must evaluate the specificity of the language of written rules and policies, whether the student satisfied the stated conditions for renewal, whether persons made assurances regarding a right to renewal, and whether any such assurances were relied on by the student when accepting the scholarship. The fact that the scholarships of most students are renewed is not determinative absent other consistent policies or rules.

[6] Colleges and Universities -- Students -- Financial Aid Nonrenewal -- Due Process -- Substantive Procedural Requirements. When rules and policies

governing the renewal of scholarships provide that aid "will be considered" for renewal if certain conditions are met, and students are granted an opportunity for a hearing if the scholarship is not renewed, the discretion of the decisionmaker is not sufficiently limited to create in the students a property interest protected under the Fourteenth Amendment in the renewal of the Scholarship.

[7] Appeal -- Assignments of Error -- Necessity -- Argument. An appellate court need not decide an issue which was not adequately briefed and to which no error was assigned in the trial court.

Sports -- Athletic Scholarships -- Nonrenewal -- (Subject of Action).

SMITH, J., did not participate in the disposition of this case.

Nature of Action: Two public university students whose athletic scholarships were not. renewed sought damages from the university for breach of contract and from their coach and the university for interference with a

contractual relationship.

Superior Court: The Superior Court for King County, No. 882-23007-2, Bobbe J. Bridge, J., on February 22, 1990, granted a summary judgment in favor of the defendants.

Court of Appeals: Holding that the students had a constitutionally protected claim of entitlement to the renewal of their scholarships, the court at 62 Wn. App. 664 affirmed the judgment except for the dismissal of plaintiff Fudzie's claim against the university, which it reversed, and remanded the case to the university for a new adversarial hearing.

Supreme Court: Holding that the students did not have a protected property interest in the renewal of their scholarships, the court reverses the decision of the Court of Appeals in part and reinstates the judgment.

Larry J. Landry for petitioners.

Kenneth O. Eikenberry, Attorney General, and

Lloyd W. Peterson, Senior Assistant, for respondent

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KEVIN CONARD and VINCENT FUDZIE,	)
Petitioners,	)
v.	)58719-1
THE UNIVERSITY OF WASHINGTON; DON JAMES and JANE DOE JAMES, husband and wife, and the marital community composed thereof,	)En Banc
Respondents.	)AUG 6 1992 Filed

DOLLIVER, J. -- In February 1983, petitioners Kevin Conard and Vincent Fudzie (plaintiffs) were recruited by the University of Washington (UW) to play football. Both plaintiffs signed national letters of intent and received offers of athletic financial 'assistance for three consecutive quarters commencing the first day of class of the fall quarter of the 1983 academic year. After signing letters of intent, student athletes who transfer to another university lose 2 years of athletic eligibility. Each offer of financial assistance covered tuition, compulsory fees, room and board, and course-related books, and each had the following provision regarding renewal:

> This assistance will be considered for renewal during subsequent periods of attendance as long as you are a student in good standing, maintain normal progress toward graduation and are in compliance with all eligibility requirements of this institution, the Pacific-i0, and the NCAA [National Collegiate Athletic Association].

The offers also stated the assistance "may be gradated or terminated only in accordance with the legislation of the NCAA,principal details of which appear on the attached sheet."' Thefollowing NCAA rules were attached and signed by Conard, Fudzie,and their guardians:

2. Financial aid shall not be revoked or altered during any period for which it has been the University may revoke aid in whole or in part if the student:

   a. is rendered ineligible for intercollegiate competition; or

   b. fraudulently misrepresents any information on the application for admission, letter-of intent or tender; or

   c. engages in serious misconduct warranting substantial disciplinary penalty; or

   d. voluntarily withdraws from a sport for personal reasons.

   Any such gradation or cancellation of aid is permissible only if such action is taken for proper cause by the regular disciplinary or scholarship awards authorities of the institution and the student-athlete has had an opportunity for a hearing. Under (d) above, such gradation or cancellation of aid may not occur prior to the conclusion of the academic term.

. . .

4. After completion of the above stated period Of this award, upon the recommendation of the Head Coach, the Director of Athletics, and the Faculty Representative, the Committee on Financial Aid will consider granting renewal of

> the assistance, providing you (1) meet the academic requirements of the National Collegiate Athletic Association, the Pacific-lO/Nor Pac Conference and the University, and (2) are a student in good standing in every respect as determined by the rules, regulations and administrative decisions of the University, the Pacific-lO/Nor Pac Conference and the National Collegiate Athletic Association.

The Department of Intercollegiate Athletics (DIA) makes recommendations regarding the renewal and nonrenewal of athleticscholarships. The DIA policies and procedure manual provides:

> If a coach wishes to withdraw a recommendation for financial aid at anytime, justification within the rules of the Conference and the Associations (AIAW/NCAA) must be fully established. Each student-athlete is entitled to due process and if the student-athlete requests an appeal as well as a hearing, *one* will be provided.

The opportunity for a hearing is also set forth in section 3-4-(g) of the NCAA constitution.

> In the latter event [a decision of nonrenewal], the institution also shall inform the *student-athlete* that if he or she believes the grant has not been renewed for questionable reasons, the student-athlete may request, and shall have the opportunity for, a hearing before the institutional agency making the financial award. The institution shall have established reasonable procedures for the prompt hearing of such a request.

Both plaintiffs allege they understood their scholarships were for 4 or 5 years depending on whether they were asked not to play or "redshirt" their freshman years. Both stated it is "commonly understood" that such scholarships are to last at least 4 years and neither had heard of an athlete whose scholarship had been "revoked". Each stated his understanding was based upon

> the offers of aid which I signed, which indicated that as long as I complied with certain criteria as set out in the offer of Financial Aid and other documentation that my aid would be renewed, and as stated above, the custom of these types of agreements.

Eric S. Godfrey is the Assistant Vice President for Student Affairs, the Director of Financial Aid, and the Chairman of UW's Athletic Financial Aid Committee which hears appeals from athletes whose awards are not renewed. Godfrey stated that "the commitment on the part of the University, in compliance with the NCAA regulations, is if the student meets these conditions, the aid will be renewed for the next academic period." Both Godfrey and Don James, the head coach of the UW football team, stated that in order for the committee not to renew a student's athletic financial aid there needed to be a finding of serious misconduct.

However, serious misconduct is not defined by any UW, NCAA, or Pac-10 rule or regulation contained in the record. James testified there are no written guidelines as to what constitutes serious misconduct, and it is up to the

discretion of the coach and the "financial aid people" on a case-by-case basis to determine whether certain acts constituted serious misconduct. Godfrey stated whether conduct constituted serious misconduct .is evaluated generally in light of UW's student conduct code and specifically by the team rules promulgated by James.

The team rules are outlined by James for the players at the beginning of every season and represent broad guidelines governing general conduct, conduct in the dressing room, conduct at practice, and conduct dealing with the press, procedures regarding injuries, and a prohibition on gambling. The rules begin with the following statement:

> The following general rules are for your benefit. Since it is impossible to cover every point or eventuality in a statement of team policy such as this, you are expected to conduct yourself at all times in a manner that will reflect credit upon you, your teammates, the football program, and the University of Washington.

In the fall 1983, plaintiffs matriculated at UW and joined the football team playing on the fifth string. There were a series of incidents involving the plaintiffs, individually and together, between that time and December 1985 when James removed them from the team and told them he would not recommend the renewal of their scholarships. The fact that the incidents, themselves, took place is not disputed, although particular aspects of the events are in dispute.

First, in November 1983, UW police notified James that Conard had been arrested for using a stolen student food credit card. James alleges that neither player denied using the card, and Fudzie states that he knew about it. James alleges he warned both players that "subsequent actions by them might result in a loss of their athletic scholarships." No formal disciplinary proceedings were brought by UW.

Next, in 1984 there were several incidents involving plaintiffs. In one incident UW police informed James that Fudzie had punched out some windows in a residence hall. Fudzie admitted the damage and paid restitution. On a separate occasion, *it* was reported that Fudzie entered a student's room and assaulted a student. In another incident, Fudzie and Conard were reported to have entered a student's room and threatened the student with bodily harm. James alleges he counseled both players as to these incidents and again warned them that if such behavior continued, they could lose their scholarships.

Also in 1984, plaintiffs attempted to extort money from a female student by blackmailing her with photographs taken while she was engaged in sexual acts with another student. As a result of the incident, plaintiffs'spent a weekend in jail on charges of extortion, but no further action was taken. James again counseled the players and warned them that unless they stayed out of trouble he would not recommend the renewal of their scholarships.

In 1985, James counseled Conard for his lack of respect for and unacceptable behavior towards service and equipment personnel. Conard was also counseled for his failure to report an injury to the trainers pursuant to the team rules. Both conversations resulted in a further warning to Conard as to the probability of the nonrenewal of his scholarship.

Finally, in December 1985, the UW football team traveled to Anaheim, California to participate in the Freedom Bowl. On the morning of December 22, plaintiffs did not report for practice with the rest of the team. Plaintiffs were later found to have spent the night in jail at the Santa Ana Police Department as the result of an altercation at a restaurant the previous evening. The police report conflicts with the account of the events given by plaintiffs. The police report states that plaintiffs were asked to leave and then escorted out of the restaurant by police for violating the establishment's dress code; while leaving, they challenged the police officers to a fight; and when the police attempted to arrest plaintiffs after they left the restaurant and were driving away, they resisted arrest. Fudzie stated that the restaurant had a policy of racial exclusion, that the officers assaulted Fudzie and Conard, who are African Americans, and that two of the officers involved in the incident have resigned from the police force due to the incident. James states that as far as he was concerned, given the previous warnings to the plaintiffs,

they should have just walked away from the incident; it was irrelevant why they were asked to leave. After the incident, James informed plaintiffs they would not play in the Freedom Bowl, they were off the team, and he would not recommend their..scholarships be renewed for the next year.

On June 24, 1986, the Athletic Financial Aid Committee convened to review recommendations for renewal and nonrenewal forwarded to them by the DIA. On July 1, 1986, in accordance with the NCAA constitution, Godfrey informed each plaintiff by letter that his athletic financial aid was not being renewed for the 1986-87 academic year. Also in accordance with the NCAA constitution, the letters informed them they could request a hearing before the Athletic Financial Aid Committee to appeal the decision of nonrenewal.

Conard did not request a hearing. As a result of low scholarship, he was dropped from UW and was scholastically ineligible to return to UW after spring quarter 1986. Conard did not petition for reinstatement and transferred to San Diego State University.

By letter dated September 3, 1986, Fudzie requested a hearing which was held on September 22, 1986. The record contains a transcript of the informal hearing. Godfrey presided over the hearing in which Fudzie gave his version of the events and challenged the information the DIA had

received verbally from James. The committee members were allowed to question Fudzie, who was not represented by counsel. Fudzie was then excused. After deliberation, the committee recommended Godfrey request James provide a written statement regarding his recommendation of nonrenewal. James submitted a written statement and documents evidencing the team rules and Fudzie's past misconduct. These documents were provided to the committee members, and based upon all the evidence, they determined unanimously that the decision of nonrenewal was reasonable and appropriate. Fudzie was notified of the decision and given a copy of the materials submitted by James.

Although Fudzie lost his athletic scholarship, he received financial aid in the amount of $10,118 for the 1986-87 academic year. While Fudzie was not awarded any aid for the following year because his aid application was not received until after the deadline, he remained at UW and received a Bachelor of Arts degree in accounting on June 11, 1988.

In December 1988, plaintiffs brought suit against UW for breach of contract and against James, his wife, and UW for interference with contractual relations. The trial court granted summary judgment in favor of UW and dismissed the suit in its entirety; the plaintiffs appealed. The Court of Appeals affirmed on the breach of contract and interference of

contractual relations claims, but held, sua sponte, that plaintiffs had a constitutionally protected claim of entitlement to the renewal of their scholarships. See Conard v. University of Wash., 62 Wn. App. 664,- 671, 814 P.2d 1242 (1991). The Court of Appeals affirmed the dismissal of Conard's complaint because he had not requested a hearing and because he was scholastically ineligible to return for the 1986-87 academic year. Conard, 62 Wn. App. at 669. The Court of Appeals reversed the dismissal of Fudzie's complaint against UW and remanded the case for an adversarial hearing because it held the informal hearing afforded Fudzie was constitutionally inadequate. Conard, 62 Wn. App. at 674.

Plaintiffs petitioned for review of the dismissal of their breach of contract claim against UW for not renewing their football scholarships, for finding no violation of Conard's due process rights, and for not providing monetary damages for the violation of Fudzie's due process rights. UW seeks review of the Court of Appeals' decision finding a violation of Fudzie's due process rights and remanding for a new hearing. This court granted review "solely to determine if the University's termination of petitioners, athletic scholarships violated their due process rights and, if so, what remedy is appropriate."

Initially, we note the Court of Appeals raised the due process issue sua sponte. We presume the Court of Appeals in its discretion found the-issue "should be considered to

properly decide[the] case", pursuant to RAP 12.1(b), even though it was not raised in the complaint or the briefs on review. RAP 12.1(b) provides that an appellate court "may notify the parties and give them an. opportunity to present written argument on the issue raised by the court." While not mandated, this procedure usually proves to be helpful in the decisionmaking and review process at both appellate levels.

Our grant of review is limited in this case to whether UW's nonrenewal of the plaintiffs' athletic scholarships violated due process under the federal constitution. Plaintiffs assert violations of due process under the federal and state constitutions in their petition for review. We will not consider the state claim, however, because the Court of Appeals' holding was limited to a federal due process violation, and the plaintiffs do not set forth the requisite analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) properly to raise an independent state constitutional challenge. Bee Petition for Review, at 10. See, e.g..., Rozner vs Bellerue, 116 Wn.2d 342, 351-52, 804 P.2d 24 (1991). Our review also does not include the contract portion of this case which was determined on summary judgment in favor of UW.

The scope of the Fourteenth Amendment's procedural protection of property interests is not coextensive with contract rights. See Perry v. Sindermann, 408 U.S. 593, 599-601, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); Board of

Regents v. Roth, 408 U.S. 564, 576-78, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). The terms of a contract may be the source of a property interest, see Roth, 408 U.S. at 566 n.l, but protected property interests include all benefits to which there is a "legitimate claim of entitlement". Roth, 408 U.S. at 577. Such a claim is "more than an abstract need or desire for" and "more than a unilateral expectation of" the benefit. Roth, 408 U.S. at 577. Property interests are created by "state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577.

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Perry, 408 U.S. at 601.

Protected interests also may be created if there are statutes or other rules which contain "'substantive predicates'" or "'particularized standards or criteria . . '" to guide the discretion of decision makers and which contain "'explicitly mandatory language,' i-e., 'specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow . . ." (Citations omitted.) Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-63, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). Although Thompson involved a liberty interest, the above test has been applied in various contexts to determine if protected property interests have been created.

See Specter v. Garrett, 1992 WL 76104, at 17 (3rd Cir. 1992); Abdullah v. Gunter, 949 F.2d 1032 (8th. Cir. 1991); Wallace v. Robinson, 940 F.2d 243 (7th Cir. 1991); Jacobs, Visconsi & Jacobs, Co. v. Lawrence, Kan-, 927 F.2d (lOth Cir. 1991); Tarpeh-Doe v. United States, 904 F.2d 719 (D.C. Cir. 1990); see also Allen v. Beverly Hills, 911 F.2d 367, 370 (9th Cir. 1990); Loehr v. Ventura Cy. Comm'ty College Dist., 743 F.2d 1310, 1315 (9th Cir. 1984); Goodisman v. Lytle, 724 F.2d 818, 820'21 (9th Cir. 1984); Parks v. watson, 716 F.2d 646, 657 (gth Cir. 1983); Jacobson v. Hannifin, 627 F.2d 177, 180 (9th cir. 1980).

Unless a legitimate claimof entitlement to the renewal of plaintiffs, scholarships was created by the terms of the contract, by a mutually explicit understanding, or by substantive procedural restrictions on the part of the decision maker, plaintiffs have no constitutional due process protections.

(1) contract

The offers of athletic financial aid to plaintiffs were clear and unambiguous in offering aid for "three consecutive quarters". "If you enroll, you will receive this assistance for three consecutive quarters . . .,, Both the trial court and Court of Appeals held there was no genuine issue of material fact that the duration of the athletic financial aid contracts between plaintiffs and UW was for only three consecutive quarters. See Conard, 62 Wn. App. *at* 670.

While review of the due process issue raises the question whether the terms of the contract created a protected property interest, the terms of the contract, as found by the Court of Appeals, control this case. Consequently, the duration of the financial aid awards of 1 academic year precludes the contracts from creating a protected property interest for 4 years.

The contract terms also do not create a legitimate claim of entitlement to the renewal of the scholarships. The offers provided only that "[t]his assistance will be considered for renewal during subsequent periods - -" (Italics ours.) The NCAA rules, attached to the offers, similarly provided only for consideration of renewal.

> After completion of the above stated period of this award, upon the recommendation of the Head Coach, the Director of Athletics, and the Faculty Representative, the Committee on Financial Aid will consider granting renewal of the assistance .

(Italics ours.) Thus, the duration of the contracts is for only 1 academic year, and terms are not sufficiently definite to establish a legitimate claim of entitlement to the renewal of plaintiffs. athletic scholarships.

(2) Mutually Explicit Understandings The plaintiffs allege they had a claim of entitlement to the renewal of their scholarships as long as they complied'with the rules of the UW, the NCAA, and the Pac-10. See Petition for Review, at

14. Plaintiffs assert they relied upon the language of their contracts and the common understanding, based upon the surrounding circumstances and the conduct of the parties, that the aid would be renewed if certain conditions were met. The issue is whether this record supports a "mutually explicit understanding" creating a protected property interest in the renewal of the scholarships'.

In Perry v. Sindermann, supra, a nontenured college professor, whose contract was not renewed and who was not provided a hearing, alleged a property interest in continued employment based upon the existence of rules and understandings which created a de facto tenure system. The plaintiff supported his allegation that the college had a "de facto tenure program" by pointing to the Faculty Guide, which provided:

> "Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has a permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work."

Sindermann, 408 U.S. at 600. The plaintiff also claimed reliance on guidelines issued by the Coordinating Board of the Texas College and University System which provided "that a person . . who had been employed . . . for seven years or more has some form of job tenure." (Footnote omitted.)

Sindermann, 408 U.S. at 600. The Court found that some universities may have "an unwritten 'common law'" that some employees are, in essence, tenured.- Sindermann, 408 U.S. at 602. The Court held the professor had "alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment" sufficient to defeat summary judgment. Sindermann, 408 U.S. at 602.

In Roth, a nontenured college professor alleged a property interest in his continued employment when his l-year teaching contract was not renewed. However, the plaintiff could point to no "University rule or policy that secured his interest *in* reemployment or that created any legitimate claim to it." (Footnote omitted.) Roth, 408 U.s. at 578. The plaintiff did assert, similar to the statement of plaintiffs in this case, that most teachers "are, in fact, rehired." See Roth, 408 U.S. at 578 n.16. The court addressed this argument in a footnote, stating:

> To be sure, the respondent does suggest that most teachers hired on a year-to-year basis . . . are, in fact, rehired. But the District Court has not found that there is anything approaching a "common law" of re-employment [citing *Sindermann,* at 602] so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him.

Roth, 408 U.S. at 578 n.16.

Two other federal cases have specifically dealt with whether a mutually explicit understanding created a protected property interest. See Santella v. Chicago, 936 F.2d 328 (7th Cir. 1991); Kraft v. Jacka, 872 F.2d 862 (9th Cir. 1989).

In Santella, a municipal employee brought suit against the City and the division chief for depriving him of a supervisory title without due process of law. He asserted that City officials had orally promised him a supervisory title. The court held, however, that those officials did not have authority to make such a promise and that Santella failed to qualify for the title under established personnel rules. The court also held Santella did not support his allegation that he obtained a supervisory title under a de facto method of hiring *"in* lieu". The "in lieu" hiring system was a budgetary convenience which was not "sufficiently certain" to give rise to a legitimate claim of entitlement. Santella, 936 F.2d at 333.

In Kraft, the court held that holders of l-year gaming licenses did not have a protected property interest in further licensing after their limited licenses automatically expired. The plaintiffs asserted the Gaming Board assured them of continued licensing as long as they met certain conditions. The sole basis for this assertion was a statement by. one Board member *"that* if, during the term of the one-year license, the Board found no 'material problems,' the Board 'may very well entertain going to the full license.'" Kraft, 872 F.2d at 869. The court held this statement was insufficient to

create a protected property interest.

Plaintiffs assert there was a "common understanding,, that scholarships were for a minimum of 4 years. Plaintiffs do not cite to any specific persons who made assurances to them regarding a right to renewal. Godfrey did state that "the commitment on the part of the University, in compliance with the NCAA regulations, is if the student meets these conditions, the aid will be renewed for the next academic period." (Italics ours.) Significantly however, unlike Santella and Kraft, nothing in the record indicates Godfrey told this to the plaintiffs, and neither plaintiff asserts he relied upon this or similar statements when accepting the offers.

Both plaintiffs allege they did not know of any student whose aid was not renewed who was in compliance with those conditions. This assertion, like that in Roth, however, is insufficient to create a common law of renewal. Like Roth, plaintiffs point to no written UW rule or policy which supports their entitlement. In fact, the language in the offers and the NCAA regulations do not accord with this statement. The offers state that if the student athlete meets certain conditions, "[t]his assistance will be considered for renewal during subseouent periods of attendance . . ." (Italics ours.) The NCAA regulations provide an opportunity for a hearing if the student athlete feels the aid was not renewed "for questionable reasons".

Like the statements in Kraft and unlike the specific written provisions in Sindermann, the language of the offers and the NCAA regulations are not sufficiently certain to support a mutually explicit understanding creating a protected property interest. As in Roth, the fact that scholarships are, in fact, normally renewed does not create a "common law" of renewal, absent other consistent and supportive UW policies or rules. As argued by UW, the usual renewal of scholarships only reflects the rarity of this level of misconduct. While the statement by Godfrey, if specifically relied on by the plaintiffs, may have been sufficient to create an issue of material fact as to whether there was a mutually explicit understanding, neither plaintiff makes such an allegation.

Moreover, plaintiffs have not established they actually met the conditions of the offers. Plaintiffs assert that "a valid finding of misconduct was never made against either Conard or Fudzie." Petition for Review, at 13. This assertion is made because plaintiffs were apparently exonerated of any misconduct the Freedom Bowl in 1985, and no formal disciplinary proceedings were brought against them as to the alleged prior misconduct. Petition for Review, at 5.

However, the language of the offers and the NCAA constitution do not require a finding of misconduct in order not to renew the scholarships. Such a finding is required only if the aid is altered or terminated during the period for which it was awarded. The language of the offers makes

clear that serious misconduct is only required to be shown if UW seeks to gradate or terminate aid "during any period for which it has been granted . . ." Here, UW did not alter or terminate plaintiffs' aid during the period for which it was granted, and no finding of serious misconduct need be made. The Court of Appeals agreed and held:

> Likewise, since there was no revocation of aid during the contract period, it is unnecessary to determine if Fudzie was guilty of serious misconduct supporting such a revocation.

Conard, 62 Wn. App. at 670-71. Nonetheless, both Godfrey and James testified that in order for the committee not to renew a student's athletic financial aid there needed to be a finding of serious misconduct. Such a finding was made by James and the committee based on plaintiffs' cumulative pattern of misconductEven if such a finding were required in making the decision not to renew, however, the record does not establish a mutually explicit understanding that plaintiffs' cumulative pattern of misconduct would not constitute serious misconduct.

Serious misconduct is not defined in any UW or NCAA rule or policy. James testified the determination whether acts constitute serious misconduct is a discretionary decision made on a case-by-case basis. Godfrey stated that whether acts constitute serious misconduct is left to the discretion of the committee and evaluated in light of the broad guidelines found *in* UW's student conduct code and the team

rules promulgated by James.

The broad guidelines set forth in the team rules are not sufficiently specific to create a mutually explicit understanding as to what acts would violate their terms, and plaintiffs have presented no language from the UW student conduct code which would create such an understanding. Therefore, even if there was a mutually explicit understanding that the plaintiffs' scholarships could not be renewed absent a finding of serious misconduct, these broad guidelines are not sufficiently definite to establish a mutually explicit understanding that plaintiffs' cumulative pattern of misconduct would not constitute such serious misconduct.

(3) Procedural Requirements

Lastly, procedural guaranties may create protected property interests when they contain "'substantive predicates"' to guide the discretion of decision makers and "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow . . ." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 462-63, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989).

In Thompson, the Court held the Kentucky prison regulations not give state inmates a protected liberty interest in receiving visitors because, although there were substantive predicates, there was no "explicitly mandatory language"

which required a particular outcome upon a finding that the relevant criteria were met. Thompson, 490 u.s. at 463. The regulations stated that a visitor "may" be denied a visit if certain grounds were present. Such a regulation did not create a protected interest because the language did not explicitly provide that a visitor must be denied a visit if the grounds were present or be allowed a visit if the grounds were absent. See also Goodisman v. Lytle, 724 F.2d 818,821 (9th Cir. 1984) (no significant limit on the discretion of University tenure decisions was found where guidelines looked to whether candidate showed "outstanding ability in teaching or research, command[ed] obvious respect from colleagueS, and provide[d] a substantial contribution"); Jacobson v. *Hannifin,* 627 F.2d 177, 180 (9th Cir. 1980) (no protected interest where only limit on discretion of gaming commission's licensing decisions was that decision had to be reasonable).

In contrast, the statutes in Parks v. Watson, 716 F.2d 646, 657 (9th cir. 1983) were found to provide a developer with a protected property interest in the vacation of certain platted city streets. The statutes specified

> that in ruling on a vacation petition, the agency "shall" determine (1) "whether the consent of the owners of the --requisite area has been obtained", (2) "'whether notice has been duly given", and (3) "whether the public interest will be prejudiced by the vacation."

Parks, 716 F.2d at 657 (quoting Or. Rev. Star. § 271.120 (1981)). The court held the first two conditions were factual in nature and the last provided an articulable standard. The statutes also mandated that if the three conditions were met, the street "shall" be vacated.

In this case, the NCAA constitution and the DIA policies and procedure manual provide for a hearing and due process respectively. However, there are no articulable standards nor explicitly mandatory language in the contracts, the NCAA constitution, or the DIA manual. The contracts provide that the aid will be considered for renewal if certain conditions are met. As in Thompson, the contracts do not state that aid must be renewed if the conditions are met or that aid must not be renewed if they are not met. The NCAA constitution states that there will be an opportunity for a hearing if the student athlete believes the aid was not renewed for "questionable reasons". This language does not provide an articulable standard and does *not* mandate a particular outcome. Lastly, the DIA manual states:

> If a coach wishes to withdraw a recommendation for financial aid at anytime, justification within the rules of the Conference and the Associations (AIAW/NCAA) must be fully established.

The record does not indicate and plaintiffs do not point to any other applicable NCAA or AIAW rules other than those already addressed. The discretion of the decision makers in this case is sufficiently limited to create a protected property

interest. Therefore, even though the DIA manual speaks to due process, such a procedural guaranty cannot create a protected property interest in a vacuum. There must be some substantive standard and explicitly mandatory language to give the hearing substance.

We hold, on the record in this case, that plaintiffs do not have a protected property interest *in* the renewal of their athletic scholarships.

We decline to address whether plaintiffs have a protected liberty interest because plaintiffs failed to assign error to and adequately brief this issue. See John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 785, 819 P.2d 370 (1991). Because plaintiffs do not have a protected interest in the renewal of their scholarships, we need not address whether the hearing provided by UW was constitutionally adequate, or what the appropriate remedy would be if a violation had occurred.

The Court of Appeals' decision holding plaintiffs had a protected property interest in the renewal of their scholarships and remanding Fudzie's case for a rehearing is reversed. The Court of Appeals' decision is affirmed in all other respects.

WE CONCUR: _____ _____ _____

_____ _____ _____

_____ _____

THE SUPREME COURT OF WASHINGTON

KEVIN CONARD and VINCENT FUDZIE, Petitioners,	MANDATE
v.	No. 58719
	King County No. 88-2-23007-2
THE UNIVERSITY OF WASHINGTON; DON JAMES and JANE DOE JAMES, husband and wife, and the marital community composed thereof, Respondents.	C/A No. 25813-3-I
	RECEIVED SEP 29, 1992 LARRY J. LANDRY

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Supreme Court of the State of Washington filed on August 6, 1992, became the decision terminating review of this court in the above entitled cause on September 28, 1992. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to rule of Appellate Procedure 14.3, costs are taxed

as follows: $557.91 awarded to Respondents and against Appellants. Order Denying Motion for Reconsideration was entered herein on September 28, 1992. Copy attached.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 28th day of September, 1992.

C. J. MERRITT
Clerk of the Supreme Court, State of Washington

cc: Mr. Larry Landry
Hon. Ken Eikenberry
Attorney General
Mr. Lloyd Peterson, Asst.
Court of Appeals, Div. I
Reporter of Decisions

RECEIVED
SEP 2 9 1992
LARRY J. LANDRY

KEVIN CONARD, ET AL,

Petitioners,

v.

THE UNIVERSITY OF WASHINGTON, ET AL

Respondents.

No. 58719-1

ORDER DENYING MOTION FOR RECONSIDERATION

The Court having decided that the petitioners' motion for reconsideration be denied,

It is hereby ordered that the motion is denied.

Dated this 28th day of September, 1992.

Chief Justice

119 Wn.2d 519